

No. 16101 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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HENRY H. BARRETT, Appellant,

vs.

IOWA NATIONAL MUTUAL INSURANCE  
COMPANY, a corporation, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Montana, Billings Division

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK



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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	7
Appeal:	
Certificate of Clerk to Transcript of Record on .....	17
Designation of Record on (USCA).....	20
Notice of .....	16
Statement of Points on (USCA).....	19
Stipulation That Exhibits Need Not Be Printed on (USCA).....	18
Certificate of Clerk to Transcript of Record...	17
Complaint .....	3
Designation of Contents of Record on Appeal (USCA) .....	20
Findings of Fact and Conclusions of Law.....	14
Judgment .....	15
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	16

ii.

Statement of Points on Appeal (USCA).....	19
Stipulation and Agreement With Respect to Facts .....	8
Exhibit A — Letter Dated Feb. 29, 1956, Charles B. Sande to Iowa National Mutual Ins. Co. ....	12
Stipulation That Exhibits Need Not Be Printed (USCA) .....	18

## NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff:

BROWN, SANDE, SYMMES & FORBES,  
200 First National Bank Building,  
Billings, Montana.

For Defendant:

COLEMAN, LAMEY & CROWLEY,  
516 Electric Building,  
P. O. Box 2529,  
Billings, Montana.





In the United States District Court for the District  
of Montana, Billings Division

Civil No. 108

HENRY H. BARRETT, Plaintiff,

vs.

IOWA NATIONAL MUTUAL INSURANCE  
COMPANY, a corporation, Defendant.

COMPLAINT

Plaintiff above named for his complaint herein respectfully alleges:

I.

That at all times herein mentioned plaintiff was and now is a citizen of the State of Montana, domiciled in the City of Billings, Yellowstone County, Montana; and the defendant, Iowa National Mutual Insurance Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Iowa; that the matter in controversy, exclusive of interest and costs, exceeds \$3,000.00.

II.

That on or about November 30, 1953, the plaintiff entered into an agreement in writing with the defendant, a copy of which is attached hereto as Exhibit A and made a part hereof as if set forth in full.

III.

That prior to May 14, 1954, the plaintiff leased

the premises referred to in Exhibit A as 15 North 32nd Street, Billings, Montana, to one Tom Hanlon, doing business under the firm name and style of Hanlon Electric Service Company; one Helen Harvey; one Vernon E. Miller and Mary I. Miller; one Joan Hirst; William M. Stratton and Dorothy Stratton; Robert E. Dosedall and Sophia Dosedall, doing business as Army Surplus Sales Company; William F. Reiner and Edith E. Reiner; and that said named individuals occupied separate portions of the premises referred to as 15 North 32nd Street, Billings, Montana, as separate tenants of the plaintiff in this action, and that they maintained in their separate portions of said premises as aforesaid certain personal property which was owned by the tenants herein referred to.

#### IV.

That each of said tenants occupied separate portions of the building described as 15 North 32nd Street, each occupant's space being segregated from and apart from the place occupied by the other occupants.

#### V.

That on or about May 14, 1954, a fire originated in said building and consumed and destroyed the said building and destroyed the personal property owned by each of the tenants as aforesaid, and that said fire originated in that portion of the first floor thereof which was occupied by one William Haas as a tenant of plaintiff, and that said fire progressed from said garage to other portions of

said building occupied by other tenants as aforesaid; that thereafter the tenant Tom Hanlon, d/b/a Hanlon Electric Service Company, filed suit against the plaintiff in the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone to recover from the plaintiff the total sum of \$11,906.96 alleged damages for the destruction of the personal property owned by said Tom Hanlon in the course of said fire; that the tenant Helen Harvey commenced an action in the same court against the plaintiff to recover damages in the the sum of \$2,305.10 for the destruction in the course of said fire of personal property owned by said Helen Harvey; that the tenant William F. Reiner and Edith E. Reiner commenced an action in the same court against the plaintiff to recover damages in the sum of \$6,544.63 for personal property of theirs destroyed in said fire; that the tenants Robert E. Dosdall and Sophia Dosdall, d/b/a Army Surplus Sales Company, commenced an action in the same court against the plaintiff to recover damages in the sum of \$7,945.80 for personal property owned by them destroyed in said fire; that the tenants Vernon E. Miller and Mary I. Miller commenced an action in the same court against the plaintiff to recover damages in the sum of \$4,759.16 for personal property owned by them destroyed in said fire. That the tenants William M. Stratton and Dorothy Stratton commenced an action in the same court against the plaintiff to recover damages in the sum of \$6,145.00; that thereafter the defendant, Iowa National Mu-

tual Insurance Company pursuant to the terms of Exhibit A annexed hereto retained the firm of Coleman, Jameson & Lamey, attorneys at law, to defend said actions for and on behalf of the plaintiff, and that subsequently all of the actions were settled for the total sum of \$5,000, said sum being divided between said plaintiffs; that the defendant, Iowa National Mutual Insurance Company, refused and declined to pay the \$5,000.00 compromise as aforesaid, and that this plaintiff was required to pay and did pay the balance of the compromise sum as aforesaid in the amount of \$4,000.00.

## VI.

That plaintiff at all times herein mentioned was and now is ready, able and willing to, and did in fact, perform all of the terms and obligations of Exhibit A on his part to be performed, but that the defendant refused and declined to pay more than \$1,000.00 thereof, disclaiming all liability in excess of \$1,000.00, although under the terms and conditions of said agreement, Exhibit A attached hereto, each claim constituted a separate accident.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$4,000.00 together with interest at the legal rate, and the costs and disbursements of this action.

BROWN, SANDE, SYMMES &  
FORBES,

/s/ By CHARLES B. SANDE,  
Attorneys for Plaintiff.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, and for its answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations of paragraphs I and II.

II.

Admits and alleges that the premises listed in Exhibit A attached to the complaint as "(2) 15 N. 32nd St., Billings, Mont." consisted of one building in which the first floor was occupied by William Haws, operating a garage, and Tom Hanlon, operating an automobile electrical shop, whereas the second floor contained living apartments occupied by the other individuals named in paragraph III of the complaint. Save as herein qualified, admits the allegations of paragraphs III, IV and V.

III.

Answering paragraph VI, denies that each claim constituted a separate accident, alleges that there was only one fire which consumed the entire building, that such constituted one accident for which under the terms and provisions of the contract, Exhibit A attached to the complaint, the defendant had a potential liability of only \$1,000. Admits that the plaintiff at all times was and now is ready, able and willing to, and did in fact, perform all of the terms and obligations of Exhibit A on his part to be performed, and that the defendant refused and



declined to pay more than \$1,000 for settlement of the claims referred to in the complaint, and disclaimed all liability in excess of \$1,000. Alleges that the defendant at all times herein mentioned was and now is ready, able and willing to, and did in fact, perform all of the terms and obligations of Exhibit A on the part of the defendant to be performed.

Wherefore, having fully answered the complaint, defendant prays that plaintiff take nothing by this action, and that defendant do have and recover its costs and expenses herein incurred.

COLEMAN, LAMEY & CROWLEY,  
/s/ By CALE CROWLEY,  
A member of the firm,  
Attorneys for Defendant.

[Endorsed]: Filed August 29, 1957.

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[Title of District Court and Cause.]

### STIPULATION AND AGREEMENT WITH RESPECT TO FACTS

It is hereby stipulated and agreed between the parties hereto, acting through their respective counsel of record, that this cause may be submitted to the court for judgment upon those facts alleged in the complaint which are admitted in the answer, and upon the following statements of fact, which the parties hereby agree are all of the facts to be submitted to the court in this action:

1. That on and after November, 1953, plaintiff was the owner in fee of that certain real property described in the complaint, and located at 15 North 32nd Street in Billings, Montana; that on May 14, 1954, the southwest corner of the ground floor of said building was leased or rented to one Tom Hanlon, doing business in said location as Hanlon Electric Service Company, and the balance of the ground floor was leased or rented to E. W. Haws, sometimes known as William Haws, who was doing business in said location as the Haws Garage; that the west half of the second floor of said building was divided into apartments which on said date were leased or rented to the remaining persons named in paragraph III of the complaint.

2. That about 5:20 A.M. on May 14, 1954, an alarm was received by the Fire Department of the City of Billings, Montana, with respect to a fire which had commenced in the said building of the plaintiff located at 15 North 32nd Street, and the Billings Fire Department arrived at said fire within two or three minutes thereafter; that a fire of unknown origin had started on the ground floor in the Haws Garage near the east end of said building, and was rapidly spreading upwards through the roof of said building and westerly through both the ground floor and the second floor, destroying the said building and all its contents; that the Billings Fire Department brought said fire under control so that it no longer spread within one hour after its arrival, and the fire was extinguished within two hours after it arrived.

3. The defendant retained the law firm of Coleman, Jameson & Lamey of Billings, Montana, to defend the plaintiff in each of the separate causes of action for damages brought against plaintiff as a result of said fire, which causes of action are referred to in paragraph VI of the complaint; that plaintiff personally retained the services of the law firm of Brown, Sande & Forbes to join with the law firm of Coleman, Jameson & Lamey, in the defense of each of said damage actions; that trial before a jury commenced in the action started by Helen Harvey; that during the progress of said trial it developed that all said claims against the plaintiff could be settled for a total payment of \$5,000.00; that thereupon the law firm of Brown, Sande & Forbes, acting for and on behalf of the plaintiff, made a demand in writing upon the defendant, true and correct copy of which is attached hereto, marked Exhibit "A", and is, by this reference, made a part hereof; that thereafter, the defendant advised plaintiff that it was the position of defendant that the maximum coverage afforded under the terms of its policy of insurance issued to plaintiff, copy of which is attached to the complaint, was \$1,000.00 for all claims arising out of the said fire of May 14, 1954, and that defendant was willing to contribute that full sum to effect such settlements; that thereafter the plaintiff contributed \$4,000.00, and the defendant contributed \$1,000.00 and the said sum of \$5,000.00 was paid to all said claimants, and in return for said payment of \$5,000.00, agreements in writing were obtained



from all claimants releasing and discharging the plaintiff from any and all liability to said claimants, and orders of court were obtained dismissing each and all of said actions for damages with prejudice; that plaintiff has at all times maintained that the maximum coverage for plaintiff under said policy of insurance for all damages arising out of said fire was and is the sum of \$10,000.00; that defendant has at all times maintained that the maximum coverage for plaintiff for all damages arising out of said fire under the terms and provisions of said policy was and is the sum of \$1,000.00; that defendant has at all times refused and declined to reimburse the plaintiff for the said sum of \$4,000.00 personally contributed by the plaintiff towards said settlement, and now refuses to pay to plaintiff the said \$4,000.00, or any part thereof.

Dated this 18th day of September, 1957.

BROWN, SANDE, SYMMES  
& FORBES,

/s/ By CHARLES B. SANDE,  
Attorneys for Plaintiff.

COLEMAN, LAMEY & CROWLEY,  
/s/ By CALE CROWLEY,  
Attorneys for Defendant.

## EXHIBIT "A"

[Letterhead of Brown, Davis & Sande.]

February 29, 1956

Iowa National Mutual Insurance Company  
c/o Coleman, Jameson & Lamey, their attorneys  
Billings, Montana  
Attention: Mr. Cale Crowley

Re: Policy No. 661171, Henry H. Barrett

Gentlemen:

You are hereby advised that the firm of Mouat & Overfelt, who represent the following plaintiffs:

Helen Harvey, claim in amount of \$2,305.10;

Joanne Hurst, claim in amount of \$3,071.22;

William F. Reiner and Edith E. Reiner, claim in amount of \$6,544.63;

William M. Stratton and Dorothy Stratton, claim in amount of \$6,145.00;

Vernon E. Miller and Mary Ina Miller, claim in amount of \$4,759.16;

Tom Hanlon, claim in amount of \$11,906.96;

Robert E. Dossdall and Sophia Dossdall, claim in amount of \$7,945.80;

in actions against Henry H. Barrett, have tendered an offer of settlement of all of the pending cases and also including two claims wherein formal pleadings have not been filed for the total sum of \$5,000.00.

It is the position of Mr. Barrett that under your policy as above designated coverage is afforded to him sufficient to settle all the claims. Demand is

Exhibit "A"—(Continued)

therefore made that the offer of Mouat & Overfelt be accepted, and that settlement of said suits and claims be made. And upon your refusal, you are hereby notified that Mr. Barrett shall hold you responsible for any damages that he might incur by your failure to accept said settlement.

Further, in the event the above offer is not accepted by you and settlement effected, Mr. Barrett makes demand that the extent of your coverage which you claim is the amount of \$1,000.00 be paid in said offer, in which event Mr. Barrett shall pay the balance in the amount of \$4,000.00 and shall look to you for reimbursement under the provisions of the above policy.

As you realize, the total of the above claims amounts to \$42,677.87, and for your information the trial of the first suit, to wit, Helen Harvey v. Henry H. Barrett, is entering its fourth day. It is now clearly evident that with the evidence that has been admitted by the court, the chance for a verdict in favor of Mr. Barrett is exceedingly slim. Therefore, if settlement is not made at this time as per the plaintiffs' offer, it is very possible that Mr. Barrett will incur judgments totaling a large sum of money.

Yours very truly,

/s/ CHARLES B. SANDE.

CBS:hg

[Endorsed]: Filed January 14, 1958.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case having been submitted to the Court upon the pleadings and upon a stipulation and agreement with respect to facts, and briefs having been submitted by the plaintiff and defendant, and the Court having considered the pleadings, stipulation and agreement and briefs, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

### Findings of Fact

The Court adopts as its Findings of Fact all of the facts alleged in the complaint which are admitted in the answer and all of the facts contained in the stipulation and agreement with respect to facts on file herein.

From the foregoing Findings of Fact the Court draws the following

### Conclusions of Law

#### I.

That this Court has jurisdiction hereof.

#### II.

That the fire which occurred on May 14, 1954, constituted a single accident within the meaning of the insurance policy which is attached as Exhibit A to the complaint.

III.

That the limit of defendant's liability under said policy as a result of the fire which occurred on May 14, 1954, is \$1000.00.

Let Judgment be entered accordingly, and counsel for the defendant is directed to prepare a form of judgment in accordance with Rule 11(b) of the Rules of Procedure of this court.

Done and dated this 25th day of April, 1958.

/s/ W. D. MURRAY,  
United States District Judge.

[Endorsed]: Filed April 25, 1958.

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In the District Court of the United States,  
District of Montana, Billings Division

Civil No. 108

HENRY H. BARRETT, Plaintiff,

vs.

IOWA NATIONAL MUTUAL INSURANCE  
COMPANY, a corporation, Defendant.

JUDGMENT

The above entitled action having duly come on for trial before the Court sitting without a jury, upon an agreed statement of facts supplementing those facts alleged in the complaint, and admitted in the answer, and briefs having been submitted to the Court by the plaintiff and the defendant, and

the court having been fully advised in the premises through the pleadings, agreed statement of facts, and briefs, and the court having made herein its findings of fact and conclusions of law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing and that this action be dismissed on the merits, and that defendant recover from plaintiff its costs herein incurred.

Dated this 30th day of April, 1958.

/s/ W. D. MURRAY,  
United States District Judge.

[Endorsed]: Filed and Entered May 1, 1958.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To Iowa National Mutual Insurance Company, a corporation, Defendant, and to Coleman, Lamey & Crowley, 500 Electric Building, Billings, Montana, Attorneys for Defendant:

Sirs:

Notice Is Hereby Given that plaintiff, Henry H. Barrett, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the Honorable W. D. Murray, United States District Judge for the District of Montana, dated April 25, 1958, rendering judgment in favor of the defendant, which judgment was entered on May 1, 1958, and from each and every interlocutory order reviewable by the Court of Appeals which was en-



tered prior to the entry of the final order herein-  
above more specifically referred to.

Dated this 25th day of May, 1958.

BROWN, SANDE, SYMMES  
& FORBES,

/s/ By WEYMOUTH D. SYMMES,  
Attorneys for Plaintiff,

Acknowledgment of Service Attached.

[Endorsed]: Filed May 26, 1958.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Civil Cause No. 108, entitled Henry H. Barrett, Plaintiff, vs. Iowa National Mutual Insurance Company, a corporation, Defendant, and designated by the plaintiff as the record on appeal in said cause (no designation being filed by the defendant);

Witness my hand and the seal of said Court at Billings, Montana, this 9th day of July, 1958.

[Seal] DEAN O. WOOD,  
Clerk,

/s/ By JOAN E. KUDE,  
Deputy Clerk.

[Endorsed]: No. 16101. United States Court of Appeals for the Ninth Circuit. Henry H. Barrett, Appellant, vs. Iowa National Mutual Insurance Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Billings Division.

Filed: July 12, 1958.

Docketed: July 19, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In The United States Court of Appeals  
For The Ninth Circuit

No. 16101

HENRY H. BARRETT, Appellant,

vs.

IOWA NATIONAL MUTUAL INSURANCE  
COMPANY, a corporation,

Appellee.

#### STIPULATION

It is hereby stipulated, consented to and agreed by and between the attorneys for the respective parties hereto that the exhibits attached to the Complaint herein need not be printed in the Transcript on Appeal, and that these exhibits may be



considered in their original form by this Court on the appeal; and that attached hereto as Exhibit A and made a part hereof as if set forth in full is the insurance policy, a copy of which is attached to the Complaint as Exhibit A, and that the attached policy may be considered by the Court of Appeals upon appeal.

Dated this 17th day of July, 1958.

BROWN, SANDE, SYMMES &  
FORBES,

/s/ By WEYMOUTH D. SYMMES,  
Attorneys for Appellant.

COLEMAN, LAMEY & CROWLEY,

/s/ By CALE CROWLEY,  
Attorneys for Appellee.

[Endorsed]: Filed July 21, 1958. Paul P.  
O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS  
ON APPEAL

1. The Court erred in its Conclusion of Law numbered II.

2. The Court erred in its Conclusion of Law numbered III.

3. The Court erred in directing the entry of judgment in favor of the defendant and against plaintiff.

4. The Court erred in entering the judgment in favor of the defendant and against the plaintiff.

Dated this 25th day of July, 1958.

BROWN, SANDE, SYMMES &  
FORBES,

/s/ By WEYMOUTH D. SYMMES,  
Attorneys for Plaintiff and  
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 28, 1958. Paul P.  
O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

To the Clerk of the United States Court of Appeals for the Ninth Circuit and to Coleman, Lamey & Crowley, Attorneys for the Defendant and Appellee in the Above Entitled Action:

Sirs:

Please take notice that pursuant to Rule 75 of the Federal Rules of Civil Procedure, the undersigned attorneys for the plaintiff and appellant in the above entitled action hereby designate the following documents to be included in the record on appeal in this case:

1. The original Complaint, except the exhibits attached to said Complaint.

2. The defendant's Answer.
3. The stipulated facts in the case.
4. The Order and Judgment.
5. The Findings of Fact and Conclusions of Law dated April 25, 1958.

Dated this 25th day of July, 1958.

BROWN, SANDE, SYMMES &  
FORBES,

/s/ By WEYMOUTH D. SYMMES,  
Attorneys for Plaintiff and  
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 28, 1958. Paul P.  
O'Brien, Clerk.

